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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL ALEXANDER MENDOZA,

Defendant and Appellant.

B148879

(Los Angeles County
Super. Ct. No. VA061709)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa and Peter Espinoza, Judges. Reversed with directions.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Raul Alexander Mendoza appeals from the judgment entered following a jury trial that resulted in his conviction of assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 1) and possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1); count 3) with a finding that he used a firearm during his commission of the assault with a firearm (Pen. Code, § 12022.5, subd. (a)(1)). Appellant was also convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count 2), but, on appellant's motion for new trial or to modify the verdict, the court ordered that count dismissed, finding insufficient evidence. Appellant was sentenced to a total prison term of 14 years.

Appellant contends that the trial court erred in denying his motion for discovery of records regarding a police detective without first conducting an in camera review of the records of that detective.

FACTS

Alberto B. testified through an interpreter that about 11:00 p.m. on September 21, 2000, when he was working as an armed security guard at the Noa Noa Bar on Atlantic Boulevard in Maywood, appellant and another man came to the bar. Alberto let appellant enter the bar. Alberto refused to let appellant's friend enter the bar, however, because appellant's friend seemed to be under 21. Appellant's friend started to enter the bar, and Alberto pushed him out.

Appellant pushed Alberto toward the street. Appellant held a beer bottle in a threatening manner. Alberto backed up, and told appellant and his friend to leave. Appellant's friend said that they would leave, and asked Alberto not to call the police. Appellant and his friend then walked away.

About 10 to 15 minutes later, appellant drove past Alberto in a black Mustang, and fired about six shots at him with a revolver. Alberto immediately ducked behind his car, and fired two shots at appellant. Appellant sped away. Alberto immediately flagged down the police, and told the police that the driver of the Mustang had shot at him. The police pursued the Mustang.

About 20 to 30 minutes later, the police took Alberto to a parking lot on Gage Avenue, where Alberto identified the Mustang. There were some items on top of the Mustang. The police did not show Alberto any driver's license or identification card. None of the officers with whom Alberto spoke that night spoke Spanish.

About two days after the shooting, Maywood Police Detective Alvarez showed Alberto a photographic lineup from which Alberto positively identified appellant's photograph as the photograph of the man who shot at Alberto. In the photographic lineup, only two photographs had a white background, appellant's photograph and the photograph of a man who looked much heavier than appellant.

Maywood Police Officer Sean Richardson testified that about 11:00 p.m. on September 21, 2000, he heard shots fired near the Noa Noa Bar. He drove toward the bar, and Alberto flagged him down and spoke to him. Officer Richardson then pursued a black Mustang. The driver of the Mustang drove at speeds of up to about 90 miles an hour in a 20-mile-per-hour zone. Officer Richardson lost sight of the Mustang, and the police set up a perimeter in the area where Officer Richardson had last seen the car. A police helicopter assisted in the search.

Officer Richardson heard a call that a prowler had jumped a fence into a backyard near where Officer Richardson was standing. Officer Richardson and Bell Police Officer Indura went to the location that had been described. In that location, a small parking lot, Officer Richardson saw a black Mustang that seemed to be the Mustang he had just chased. No one was in or near the Mustang. Officer Richardson noted that the Mustang's engine was warm. The Mustang was registered to appellant.

Two wallets were found inside the Mustang. Appellant's driver's license was in a wallet found on the driver's side floorboard. The other wallet, which was found on the floorboard on the passenger side of the vehicle, contained an identification card for Rene Flores. Appellant's driver's license stated that appellant was six feet tall.

Maywood Police Officer Hardin took Alberto to the parking lot. Alberto positively identified the Mustang as the car involved in the shooting. The wallets, driver's license, and identification card were placed on top of the Mustang. Alberto looked at the driver's license

and identification card. Without picking up either the driver's license or the identification card, Alberto said, "'That's the man that shot at me,'" and "'Those are the men that I fought with.'" Alberto said that appellant had driven the Mustang and that Flores was the passenger in that car.

Maywood Police Officer Joseph Hardin testified that about 11:00 p.m. on September 21, 2000, he went to the Noa Noa Bar and spoke to Alberto. A car outside that bar had about five bullet holes on the driver's side. Officer Hardin took Alberto to another location, where Alberto identified a Mustang as the car that had left the scene of the shooting. Alberto looked at a driver's license and an identification card that were on top of the Mustang, and said, "'Hey, that's . . . the guy who shot at me.'"

Maywood Police Detective Carlos Alvarez testified that in the early morning hours of September 23, 2000, he went to the Noa Noa Bar and showed a photographic lineup to Alberto. Alberto positively identified appellant's photograph as a photograph of the perpetrator. Alberto did not hesitate in his identification. Detective Alvarez had included appellant's photograph in the photographic lineup, because Detective Alvarez had information that Alberto had previously identified appellant from appellant's driver's license. Appellant was arrested after appellant came into the police station on September 22, 2000. Appellant came into the station on his own, not having been called there by Detective Alvarez or any other officer. Appellant had a mustache when he was arrested.

It was stipulated that appellant had previously been convicted of a theft-related felony.

In defense, appellant testified that on the night of September 21, he watched a video at home with his girlfriend, Zulema, and her friend Aldana Mendez. Appellant had gone to the video store about 6:30 p.m. and had then returned home. He left his wallet in his car, as he customarily did. The wallet of his friend Rene Flores was also in appellant's car. On September 21, Flores was in prison. Appellant did not leave his house after returning home from the video store.

While appellant, his girlfriend, and her friend watched the video, appellant's cousin Eric Alvarado and Alvarado's friend came to appellant's home. Alvarado asked appellant for a ride, and appellant refused. Alvarado then asked appellant for permission to borrow his car, and appellant again refused. However, appellant gave Alvarado a key to appellant's house so Alvarado could come into the house later that night to sleep there. Appellant's car keys were hanging in the kitchen.

The next morning, appellant's car was missing. Appellant called the Bell Police Department to report that his car was missing. The Bell Police Department told appellant to call the Maywood Police Department. Appellant called the Maywood Police Department and told them that his car was missing. Maywood Police Detective Gonzalez told appellant to come to the Maywood police station. Appellant paged Alvarado and Alvarado said that he had taken appellant's car. Appellant then told Alvarado that he was filing a police report. Appellant went to the Maywood police station that afternoon, and told Maywood Police Detectives Gonzalez and Alvarez that Alvarado had taken his car. On the night of September 21, appellant was not involved in the shooting.

Mendez and Alvarado live in South Central Los Angeles. At trial, appellant did not know where his girlfriend was. Appellant did not give the police Alvarado's pager number. Appellant told Detective Gonzalez that appellant's cousin lived at Avalon Boulevard and 52d Street. Appellant did not give the police the address, because appellant did not know the address. He did not remember whether he had told the police that Alvarado's friend had also come to his house. Appellant told the police that Alvarado was about five feet seven inches tall, weighed about 160 to 170 pounds, and had a goatee and long hair.

In rebuttal, Enrique Leon testified that on September 21, 2000, he was working at Western Firearms in Bell. A Hispanic male who had short hair and a mustache and was about five feet nine inches tall ordered handgun grips for a revolver that day. The male said that his name was Jose Mendoza. The customer never returned to pick up the handgun grips. On October 18, 2000, and November 13, 2000, Leon called the number the customer had given him, but the number was not in service.

Maywood Police Detective Enrique Gonzalez testified that about 2:00 p.m. on September 22, 2000, appellant came into the Maywood police station and reported that Alvarado had taken his car. Appellant said that he had first gone to the Bell Police Department, but that the Bell Police Department had sent him to the Maywood Police Department. Detective Gonzalez informed appellant that his car had been reported as having been involved in a shooting.

Detective Gonzalez advised appellant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and appellant waived those rights. Appellant told Detective Gonzalez that Alvarado had been at appellant's house the previous night. Detective Gonzalez asked appellant where Alvarado could be found, and appellant said he did not know. Appellant did not tell Detective Gonzalez that someone else was with Alvarado at appellant's house the previous night. Appellant also did not tell Detective Gonzalez that Alvarado could be found near 52d Street and Avalon Boulevard in South Central Los Angeles. Detective Gonzalez did not ask appellant for Alvarado's telephone number. Appellant never provided Detective Gonzalez with either a phone number or pager number for Alvarado. Appellant did not tell Detective Gonzalez that between the time he called the Bell Police Department and the time he spoke to Detective Gonzalez, Alvarado had told appellant that Alvarado had taken appellant's car.

Throughout the conversation, appellant maintained that he was not involved in the shooting. He continually stated that he was home watching videos with his girlfriend. Appellant described Alvarado's approximate age, weight, height, hair color, eye color, and facial hair. Appellant said his cousin had a goatee and mustache.

When Detective Gonzalez questioned appellant, Detective Gonzalez used a computer to type information appellant gave him. Detective Gonzalez does not type quickly. Detective Gonzalez did not make an audiotape or videotape of the interview or write notes of the interview.

In surrebuttal, appellant testified that he had never purchased the handgun grips listed in the receipt from Western Firearms. Appellant had never seen that receipt, did not go into that store on September 21, and had never been in that store.

DISCUSSION

Before trial, appellant moved to discover information regarding any complaints against or investigations of improper tactics, dishonesty, untruthfulness, false arrest, fabrication of charges, or planting of evidence by Maywood Police Officers Richardson and Hardin and Maywood Police Detective Alvarez. In a declaration dated November 1, 2000, defense counsel stated that the defense would be that the police arrested the wrong person. She noted that Detective Alvarez claimed a defense witness first gave an alibi for appellant but that the detective stated the witness later changed her story. Defense counsel explained the defense would claim the witness never told the detective that she lied.

In a supplemental report attached to the motion, Detective Alvarez stated that on September 22, 2000, at 2:00 p.m., appellant and his girlfriend, Zulema Sanchez, came to the Maywood Police Department and inquired about appellant's vehicle having been impounded. Appellant was subsequently arrested for violation of Penal Code section 245. Detective Alvarez asked why she and appellant had come to the Maywood Police Department. Sanchez told the detective that appellant wanted to get his car "out of impound" and that Alvarado had taken the car without permission. She also stated that she and appellant had been home watching a video, that Alvarado had come to the apartment, and that Alvarado was drunk. She said that Alvarado was 20. When the detective asked Sanchez if she knew where Alvarado lived, she said that she did not know. She claimed that Alvarado had asked appellant to borrow his car and that appellant had told Alvarado he could not borrow the car because he was drunk.

Sanchez told Detective Alvarez that after the video was over, she and appellant went into their bedroom to sleep. Alvarado remained in the living room, watching television. In the morning, appellant discovered his car was missing. Alvarado never returned home with the car. Appellant called the Bell Police Department to find out whether his car had been impounded. The Bell Police Department told appellant that his vehicle had been impounded by the Maywood Police Department.

Detective Alvarez told Sanchez that appellant's vehicle had been used in a Penal Code section 245 violation and that appellant had been arrested for that crime. Detective

Alvarez also told Sanchez that he did not believe her story, and he told Sanchez to tell him the truth. Detective Alvarez then asked Sanchez whether appellant was home all night with her. She said that he was not. Detective Alvarez asked Sanchez whether appellant had gone to a bar, and she said that he had. Detective Alvarez then asked Sanchez what time appellant had left the apartment. She told Detective Alvarez that appellant had left the apartment at 7:00 p.m. Appellant had told Sanchez that he was going to pick up Alvarado, and Sanchez remained home with her friend Adriana Mendez. Sanchez did not know Mendez's address, but gave the detective Mendez's telephone number. When Detective Alvarez asked Sanchez what time appellant returned home, she said she thought he returned home at 10:00 or 11:00 p.m. Detective Alvarez asked Sanchez whether she was sure what time appellant had returned home, and she said that she was not sure. Sanchez told the detective that she was asleep when appellant returned home and that she did not look at the clock. Sanchez told the detective that in the morning appellant told her that he "got into some problems at the bar" and had left the car somewhere. Detective Alvarez asked Sanchez what kind of problems appellant had gotten into, and she said she did not know. Sanchez said that she and appellant had discussed the story they were going to tell the police. Sanchez also said appellant had told her to lie.

On December 4, 2000, Judge Robert Higa denied the motion without holding an in camera hearing. Judge Higa stated that there had not been a sufficient showing that any of the officers employed improper tactics. Judge Higa therefore concluded that good cause had not been shown. Judge Higa stated, "It seems to me in every case you could get access to the officer's jacket or the files, in every misidentification case or in every case where an alibi witness does or does not change a story. [¶] That just means that in every case their files would be open to scrutiny, and I don't think that is the state of the law. I think there is a little more confidentiality than that."

Appellant filed a second motion to discover the same information regarding Officers Richardson and Hardin and Detective Alvarez. In a declaration dated December 21, 2000, defense counsel stated that Detective Alvarez had interviewed Sanchez and that Sanchez had told the detective that she was home with appellant at the time of the offense. She had

given details to support an alibi defense. The detective then told Sanchez that he did not believe her story. According to Detective Alvarez, Sanchez then changed her story, telling the detective that appellant left home at 7:00 p.m., that appellant did not return until 10:00 or 11:00 p.m., and that appellant told her he had had problems at the bar.

An investigator from the Los Angeles County Public Defender's office interviewed Sanchez. Sanchez told the defense investigator that she never changed her story. She explained to the defense investigator that she was with appellant on the evening in question and that she had given Detective Alvarez only one description of the evening. Defense counsel pointed out that this discrepancy indicated Detective Alvarez's credibility was at issue. Appellant attached Detective Alvarez's supplemental report to the second motion.

On February 1, 2001, Judge Peter Espinoza denied the second motion without holding an in camera hearing. Judge Espinoza determined that appellant had not stated "probable cause, or adequate cause" for an in camera hearing.

Evidence Code section 1043 provides that a motion for discovery of peace officer personnel records must include an affidavit showing good cause for the discovery or disclosure sought. In *People v. Gill* (1997) 60 Cal.App.4th 743 (*Gill*), the appellant was charged with possession of cocaine. Defense counsel asserted that it would be a defense that Long Beach Police Officer Hunt had placed the alleged contraband on the appellant to cover up the officer's use of excessive force and that the officer had a pattern of fabricating probable cause in drug cases. We noted that any history of complaints of similar misconduct in the officer's personnel file could lead to admissible evidence of habit or custom, which could aid the appellant's defense to the charge. (*Id.* at p. 750.) We held that the appellant had demonstrated good cause for the requested discovery and that the trial court had abused its discretion by summarily denying the discovery motion. (*Ibid.*) We explained that the trial court should have conducted an in camera hearing to determine the presence of any discoverable material in the officer's personnel file. (*Ibid.*)

In the present case, appellant twice demonstrated good cause for the requested discovery regarding Detective Alvarez. As noted, defense counsel asserted in her first declaration that Detective Alvarez claimed a defense witness first gave an alibi for appellant

and later changed her story. Defense counsel further stated in her first declaration that the defense would be that the police arrested the wrong person and that appellant would claim that the witness had never told Detective Alvarez that she lied. That declaration demonstrated good cause for the requested discovery. (*Gill, supra*, 60 Cal.App.4th at p. 750.)

As also noted, defense counsel asserted in her second declaration that Sanchez told a defense investigator that she was home with appellant at the time of the offense. Sanchez also told the defense investigator that she gave Detective Alvarez only one description regarding the evening in question. The second declaration also demonstrated good cause for the requested discovery regarding Detective Alvarez. (*Gill, supra*, 60 Cal.App.4th at p. 750.) Thus, the trial court should have conducted an in camera hearing to determine the presence of any discoverable material in Detective Alvarez's personnel file. (*Ibid.*; *People v. Mooc* (Dec. 24, 2001, SO90666) ___ Cal.4th ___ [pp. 10-16].)

In *Gill, supra*, 60 Cal.App.4th 743, we were unable to conclude whether the discovery that had been improperly denied would have led to admissible evidence of sufficient weight to be helpful to the appellant in his defense. (*Id.* at pp. 750-751.) We explained: "There may not have been any prior complaints against Officer Hunt of the type of conduct specified in appellant's discovery request. If so, access to Officer Hunt's personnel file would not have led to any admissible evidence usable by appellant to affect the outcome of his trial, and summary denial of appellant's discovery request would not have been prejudicial." (*Id.* at p. 751.)

We reversed the judgment in *Gill, supra*, 60 Cal.App.4th 743, with directions to conduct an in camera hearing on the appellant's discovery motion. We stated that if the in camera hearing revealed no discoverable information in the personnel file that would lead to admissible evidence helpful to the appellant's defense, the trial court was required to reinstate the original judgment and sentence. We further stated that if the in camera hearing revealed discoverable information that could lead to admissible evidence helpful to the appellant in defense of the charge against him, the trial court was required to grant the requested discovery and order a new trial. (*Id.* at p. 751.)

In the present case, we are unable to determine whether the requested discovery would have led to admissible evidence of sufficient weight to be helpful to appellant's defense. We therefore conclude that the limited remand procedure described in *Gill, supra*, 60 Cal.App.4th 743, is appropriate here.

DISPOSITION

The judgment is reversed with directions to conduct an in camera hearing on appellant's discovery motions regarding Maywood Police Detective Carlos Alvarez consistent with this opinion. The in camera hearing shall be conducted in the manner required by *People v. Mooc* (Dec. 24, 2001, S090666) ___ Cal.4th ___ (pp. 14-15). If the in camera hearing reveals no discoverable information in Detective Alvarez's personnel file that could lead to admissible evidence helpful to appellant's defense, the trial court shall reinstate the original judgment and sentence. If the in camera hearing reveals discoverable information that could lead to admissible evidence helpful to appellant in defense of the charges against him, the trial court shall grant the requested discovery regarding Detective Alvarez and order a new trial.

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We concur:

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_____, J.
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